

July 6, 2015

TO: Criminal Rules Committee

FROM: Discovery Sharing Sub-Committee - Dave Vandenberg and Steve Jacobson

We have been monitoring the implementation of the new discovery system. Phil Cherner has regularly updated us on its progress. Recently, Phil suggested that it was time for us consider a rule change. The Xerox Corporation has been given the contract and Phil says things are moving right along.

We are providing the following information to assist the full committee in discussing a rule change at the upcoming meeting.

The rule presently states:

**Rule 16 (V) (c) Cost and Location of Discovery.**

**The cost of duplicating any material discoverable under this rule shall be borne by the party receiving the material, based on the actual cost of copying the same to the party furnishing the material. Copies of any discovery provided to a defendant by court appointed counsel shall be paid for by the defendant. The place of discovery and furnishing of materials shall be at the office of the party furnishing it, or at a mutually agreeable location.**

We agree that Crim.P. 16(V)(c) needs to be modified to reflect the new procedure. We agree the rule needs to clearly address the intention of the legislature. The legislation, SB14-190, specifically says: "(2) It is the intent of the general assembly that once the statewide discovery sharing system is operational the district attorneys shall not seek or receive reimbursement for copying discovery from anyone." We agree the rule needs to make this point very clear. Accordingly, a modified rule could say something like:

**Rule 16 (V) (c) Cost and ~~Location~~ Method of Delivery of Discovery.**

**Any material discoverable to the defense shall be provided through the statewide discovery sharing system, all at government expense.**

At the same time there are other issues. They include:

- a. The Legislature does not address what happens in the event that the defense is providing reciprocal discovery under Crim.P. 16(II). We both think the legislature wasn't thinking about this issue in adopting the new system. As noted above, the current version of 16(V)(c) contains the phrase the "cost of duplicating any material shall be borne by the party receiving the material." In the absence of other guidance from SB 14-190 on what they had planned for

reciprocal discovery, this provision of Crim. P. 16 indicates that the DA's office would presumptively bear the cost of reciprocal discovery as the "receiving party." However, we agree SB14-190 does not help us at all with guidance on that. One option could be to add the following sentence to the above:

**For any materials provided to the prosecution as part of the defense reciprocal discovery obligation, if any, the cost shall be borne by the prosecution based on the actual cost of duplication.**

- b. Existing Crim.P. 16(V)(c) also addresses that if appointment counsel provides copies of discovery to a defendant, the defendant pays, not the counsel (i.e. PD or ADC). We need to address this. We could just maintain this language and add back in this sentence:

**Copies of any discovery provided to a defendant by court appointed counsel shall be paid for by the defendant.**

- c. What do we do with the old language identifying the place of discovery? Should that be changed to identifying a "method of discovery?" Should we leave out both concepts since the new system address place and method and defense discovery is rarely voluminous enough for reasonable people to debate about methods or places of delivery?
- d. The statute states that the rule change takes effect November 1, 2016 or "upon such earlier date as the Statewide Discovery Sharing System is represented to be operational by the Colorado District Attorney's Council." Shall we ask the Court to use similar effective date language in adopting the rule change?
- e. Should we add a comment referring to the discovery sharing system statute? If so, should it be a simple "See \_\_\_\_\_", or should we do a summary?

Steve Jacobson  
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